(8)

No. 96-272

In The

Supreme Court of the United States

October Term, 1996

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF NATIONAL STEEL AND SHIPBUILDING COMPANY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF NATIONAL STEEL AND SHIPBUILDING COMPANY IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, NATIONAL STEEL AND SHIPBUILDING COMPANY ("NASSCO") moves for leave to file the Brief *Amicus Curiae* in support of Petitioner METROPOLITAN STEVEDORE COMPANY ("Petitioner"). Petitioner has consented in writing to NASSCO filing a Brief *Amicus Curiae* on its behalf. A letter of consent is being filed with the Clerk of this Court with NASSCO's Brief *Amicus Curiae*. Respondent JOHN RAMBO ("Respondent" or "Claimant") also has consented in writing to NASSCO's filing a Brief *Amicus Curiae*. A letter of consent is being filed with the Clerk of the Court with NASSCO's Brief *Amicus Curiae*. NASSCO has been unable to obtain consent from Respondent Director, OWCP.

NASSCO is a San Diego based shipbuilding and ship repair company which currently employs in excess of 5,000 employees. Claims by most of those employees for work-related injuries fall within the jurisdiction of the California Workers' Compensation Act, California Labor Code § 3600 *et seq.*, and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* ("LHWCA").

NASSCO is self-insured and self-administered for LHWCA benefits. As such, NASSCO has a strong interest in the above-captioned case. The decision of the Court will directly affect the liability of NASSCO, and the manner in which claims of injured NASSCO employees are administered by NASSCO, including the ability of

NASSCO to settle its LHWCA claims. NASSCO and indeed all ship repair and shipbuilding companies that are covered by the LHWCA have a vital stake in the question now before the Court.

Unless the Ninth Circuit is reversed on the question now before the Court, NASSCO will be routinely confronted with LHWCA claims for nominal awards for permanent partial disability by injured employees who have returned to work at wages equal to, or higher than, their pre-injury wages. Therefore, the Ninth Circuit's decision, if left intact, will have a significant economic impact on NASSCO and the ship construction and ship repair industry. Accordingly, *Amicus Curiae* NASSCO respectfully requests leave to file the attached Brief *Amicus Curiae* in support of Petitioner.

DATED: January 10, 1997

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICUS CURIAE

NASSCO is a San Diego based shipbuilding and ship repair company which currently employs in excess of 5,000 employees. Claims by most of those employees for work-related injuries fall within the jurisdiction of the California Workers' Compensation Act, California Labor Code § 3600 *et seq.*, and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* ("LHWCA").

NASSCO is self-insured and self-administered for LHWCA (and California Workers' Compensation Act) benefits. As such, NASSCO has a strong interest in the above-captioned case. The decision of the Supreme Court will directly affect the liability of NASSCO, and the manner in which claims of injured NASSCO employees are administered by NASSCO, including the ability of NASSCO to settle its LHWCA claims. NASSCO and indeed all ship repair and shipbuilding companies that are covered by the LHWCA have a vital stake in the question now before the Court.

The ship repair and ship construction industry is by nature engaged in a cyclical business. Ship repair and ship construction employees typically are hired when contracts are obtained, and then laid off at the completion of the ship repair and ship construction projects. The employees are then rehired when new ship repair or ship construction work is obtained. However, the Ninth Circuit's decision will, in effect, provide LHWCA claimants with the ability to obtain increased LHWCA benefits (i.e., unemployment benefits) during periods of subsequent layoff.

Unless the Ninth Circuit is reversed on the question now before the Court, NASSCO will be routinely confronted with LHWCA claims for nominal awards for permanent partial disability by LHWCA claimants who have returned to work at wages equal to or higher than their pre-injury average weekly wages. The Ninth Circuit decision will also serve as a disincentive to LHWCA claimants who have returned to work to settle claims. That will undoubtedly result in increased costs to the shipyards for administration, litigation and payment for LHWCA claims for nominal awards for permanent partial disability to employees who do not have an economic disability.

In addition, if the Ninth Circuit's decision is affirmed, the amount of reserves maintained for workers' compensation by NASSCO and other self-insured shipyards would have to be increased accordingly. That will, of necessity, be accompanied by a reduction in the amount of funds available for capital improvement and growth. Therefore, the Ninth Circuit's decision, if left intact, will have a significant economic impact on NASSCO in particular and on the ship construction and ship repair industry in general.

II

SUMMARY OF ARGUMENT

In the case before the Court, the Ninth Circuit held in part that a LHWCA claimant is entitled to a nominal or *de minimis* award for permanent partial disability in order to preserve the LHWCA claimant's right to seek modification indefinitely pursuant to Section 22, 33 U.S.C. § 922.

Thus, although Congress enacted LHWCA Section 22 with a one-year statute of limitations, the Ninth Circuit has read out of the LHWCA that statute of limitations under the guise of construction. In so doing, the Ninth Circuit has gone well beyond its authority and attempted to "rewrite Congress's words."

In the case before the Court, the administrative law judge ("ALJ") as the trier of fact found that Claimant had returned to work at wages well in excess of his pre-injury average weekly wage, and therefore had not sustained the economic "disability" required by the LHWCA to support an award for permanent partial disability. However, the Ninth Circuit substituted its own view for that of the ALJ in violation of the court of appeals' standard of review.

The Ninth Circuit also improperly relied on speculation and surmise. Indeed, conjecture that a LHWCA claimant (who is earning higher wages post-injury) may possibly be laid off at some indefinite time in the future, relied upon by the Ninth Circuit, does not constitute substantial evidence in support of a nominal or *de minimis* award for permanent partial disability.

The construction of LHWCA Section 22 by the Ninth Circuit will result in increased litigation and administration costs and interfere with efficient administration of the LHWCA. Although the Ninth Circuit's rationale for its decision, preserving indefinitely a LHWCA claimant's right to seek modification, is a "laudable concern," the LHWCA does not provide for *de minimis* awards in order to preserve the Section 22 statute of limitations. The Ninth Circuit's decision provides for a recovery not

authorized by Congress, and should therefore be reversed.

III

ARGUMENT

A. The Ninth Circuit's Decision Improperly Nullifies the LHWCA Statute Of Limitations.

In *Morrison-Knudsen Construction Company v. Director, OWCP,* 461 U.S. 624, 636, 103 S. Ct. 2045, 2052 (1983), this Court emphasized that the LHWCA is not a simple remedial statute intended for the benefit of workers. Rather, the LHWCA was designed to strike a balance between the concerns of longshore and harbor workers on the one hand, and their employers on the other. *Id.; see Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 951 (3rd Cir. 1990), *cert. denied,* 498 U.S. 1067, 111 S. Ct. 783 (1991) (the LHWCA was specifically drafted to benefit not only employees, but also employers); *cf. Director, OWCP v. Detroit Harbor Terminals,* 850 F. 2d 283, 291 (6th Cir. 1988) ("[with the 1972 Amendments], . . . Congress also made it clear that the rights of employers and insurance carriers would not be ignored").

Consistent with that balance, Congress enacted as part of the LHWCA a one-year statute of limitations for filing initial LHWCA claims, 33 U.S.C. § 913, and also a one-year statute of limitations for filing modification claims. 33 U.S.C. § 922. The statute of limitations manifests the Congressional intent to deny compensation in all cases of disability arising from industrial injury unless

the claim is filed within the prescribed time period, without provision for exception. *Kobilkin v. Pillsbury,* 103 F.2d 667 (9th Cir. 1939), *aff'd,* 309 U.S. 619, 60 S. Ct. 465 (1940).

In the case before the Court, the Ninth Circuit held that a nominal or *de minimis* award for permanent partial disability to a LHWCA claimant is appropriate even when the claimant does not currently manifest an economic disability, the threshold requirement for an unscheduled permanent partial disability award. *See* 33 U.S.C. §§ 902(10), 908(c)(21); *Sproull v. Director, OWCP,* ___ F.3d ___, 30 BRBS 49, 50 (CRT) (9th Cir. 1996) ("permanent partial disability benefits are intended to compensate an injured employee for loss of wage earning capacity, which is calculated by comparing the employee's post-injury 'wage earning capacity' with his pre-injury 'average weekly wages' "). The Ninth Circuit reasoned that such a nominal award is proper in order to "preserve" the claimant's right to future LHWCA benefits in either an initial award determination or a modification proceeding because the claimant "may" at some indefinite time in the future sustain an economic disability.[1] *Rambo v. Director,*

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[1] In so ruling, the Ninth Circuit relied on LHWCA Section 8(h), 33 U.S.C. § 908(h), which allows the ALJ to consider the effects of a disability as it may extend into the future. However, in relying on Section 8(h), the Ninth Circuit ignored the threshold requirements of Section 2(10), 33 U.S.C. § 902(10) and Section 8(c)(21), 33 U.S.C. § 908(c)(21), which initially require a finding that the claimant sustain a "disability" before the effects of that disability as it may extend into the future can be considered. *See Owens v. Traynor,* 274 F. Supp. 770 (D. Md. 1967), *aff'd,* 396 F.2d 783 (4th Cir. 1968), *cert. denied,* 393 U.S. 962, 89 S. Ct. 401 (1968).

OWCP, 81 F.3d 840, 843-844 (9th Cir. 1996), *cert. granted*, ___ U.S. ___, 117 S.Ct. 504 (1996).

The Ninth Circuit further reasoned:

> While a nominal award does indefinitely extend the period for modification, it is the only mechanism available to incorporate the possible future effects of a disability in an award determination. Thus, it is an appropriate mechanism, especially in a modification proceeding . . . where the claimant has already been given an award based on finding of permanent partial disability. [81 F.3d at 844.]

However, in so concluding, the Ninth Circuit essentially read the one-year statute of limitations out of Section 22. In *Pillsbury v. United Engineering Company*, 342 U.S. 197, 200, 72 S. Ct. 223, 225 (1952), this Court emphasized that the courts are not free, under the guise of construction, to amend the LHWCA. The Court noted:

> We are aware that [the LHWCA] is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. Petitioner's construction would have the effect of extending the limitation indefinitely . . . ; the provision would then be one of extension rather than limitation. While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us. [*Id.*]

The same reasoning applies no less (over forty-four years later) to the construction of the LHWCA by the

Ninth Circuit herein. The Ninth Circuit's construction would have the effect of extending the Section 22 one-year statute of limitations indefinitely. While that may be desirable for LHWCA claimants, the courts do not have the power to rewrite the LHWCA and make what was intended to be a limitation no limitation at all. *See Pillsbury v. United Engineering, supra.*

The Ninth Circuit's decision, which allows nominal awards and preserves indefinitely the right to seek modification, will also substantially increase litigation because it will preserve indefinitely the ability of LHWCA parties to litigate their cases. However, with the 1972 Amendments to the LHWCA, Congress increased the compensation benefits provided to LHWCA claimants and attempted to reduce litigation. *See Bloomer v. Liberty Mutual Insurance Company*, 445 U.S. 74, 82-83, 100 S. Ct. 925, 930 (1980). The Court should thus be " . . . unwilling to attribute to Congress an intention to allow creation of a new liability irreconcilable with its general desire to reduce litigation. . . . " *Id.* at 86, 100 S. Ct. at 932.

Indeed, the Ninth Circuit has also previously concluded that the avoidance of litigation and efficient administration of the workers' compensation system are important factors which may support or undermine adoption of a particular construction of the LHWCA. *See Todd Shipyards Corp. v. Black*, 717 F. 2d 1280, 1285 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). In the present case, the Ninth Circuit's construction of Section 22 of the LHWCA would increase litigation and interfere with the efficient administration of the LHWCA. Therefore, those factors militate against adoption of the construction of the LHWCA by the Ninth Circuit herein.

Furthermore, Congress could have enacted Section 22 without a statute of limitations or with a longer statute of limitations. Congress certainly knows how to do so. In 1984, Congress extended the statute of limitations for claims for occupational disease beyond one year. *See* 33 U.S.C. § 913(b)(2); *Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989). In 1984, Congress also amended the LHWCA to preserve the timeliness of hearing loss claims filed more than one year after the employee's last exposure. *See* 33 U.S.C. § 908(c)(13)(D); *Bath Iron Works Corp. v. Director, OWCP,* 506 U.S. 153, 113 S. Ct. 692 (1993). Therefore, the Ninth Circuit's decision, which ignores the clear terms of Section 22, improperly nullifies the LHWCA Section 22 statute of limitations under the guise of construction.

Implicit in the Ninth Circuit's decision is the apparent premise that a LHWCA employer is responsible or liable indefinitely for a LHWCA claimant's continued employment after an industrial injury, even after the claimant has returned to regular and continuous employment at wages well in excess of the claimant's pre-injury average weekly wage. However, the LHWCA is a workers' compensation statute and not an unemployment statute. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F. 2d 1031, 1042 (5th Cir. 1981) (the LHWCA employer is not an employment agency); *Pilkington v. Sun Shipbuilding and Dry Dock Company.* 9 BRBS 473, 480 (1978) ("the law . . . does not require that the employer actually find some other employment for the claimant"); *Pernell v. Capitol Hill Masonry,* 11 BRBS 532, 537 (1979) ("it is a workers' compensation statute we are interpreting, not an unemployment compensation statute"); *Devillier v. National*

Steel and Shipbuilding Company, 10 BRBS 649, at 658 (where post-injury employment is sufficiently regular and continues to establish a true wage earning capacity, the claimant "must take [his] chances on unemployment like anyone else"). Unless the Court reverses the mistaken premise that the LHWCA is an unemployment statute, the Ninth Circuit's decision will severely and unfairly impact upon the liability of employers in the ship repair and ship construction industry, which typically are engaged in a cyclical business.

Moreover, the Benefits Review Board ("BRB") has repeatedly expressed its dissatisfaction with *de minimus* awards of benefits, correctly viewing them as judicially created infringements upon the province of Congress because they indefinitely extend the time period provided for modification in Section 22. *See Mavar v. Matson Terminals, Inc.*, 21 BRBS 336 (1988); *Peele v. Newport News Shipbuilding & Dry Dock Company,* 20 BRBS 133 (1987); *Porras v. Todd Shipyards Corp.*, 17 BRBS 222 (1985), *aff'd sub nom., Todd Shipyards Corp. v. Director, OWCP,* 792 F.2d 1489 (9th Cir. 1988); *Smith v. Newport News Shipbuilding & Dry Dock Company,* 16 BRBS 287 (1984). The BRB's interpretation is "reasonable and reflects the policy underlying the statute," *see Kaiser Steel Corp. v. Director, OWCP,* 812 F.2d 518, 521 (9th Cir. 1987), and thus should be accorded weight.

Therefore, the Ninth Circuit's decision, which improperly nullifies the statute of limitations in Section 22 as enacted by Congress, should be reversed.[2]

B. Conjecture That A LHWCA Claimant May Possibly Be Laid Off Due To Lack Of Work At Some Indefinite Time In The Future Does Not, As A Matter Of Law, Constitute "Substantial Evidence" Sufficient To Support An Award For Permanent Partial Disability Under The LHWCA.

As noted by this Court, the LHWCA is a " . . . comprehensive scheme to provide compensation 'in respect of disability or death of an employee . . . ' " and " . . . compensation, as an initial matter, is predicated on loss of wage-earning capacity. . . . " *Metropolitan Stevedore Company v. Rambo*, ___ U.S. ___, 115 S. Ct. 2144, 2147-2148 (1995). Indeed, "the fundamental purpose of the LHWCA is to compensate employees (or their beneficiaries) for wage-earning capacity lost because of injury." *Id.* at 2148.

In the present case, it is undisputed from the evidence in the record that Claimant was retrained as a crane operator after his 1980 industrial injury, and that his post-injury wages between 1985 and 1990 were more

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[2] The decisions in *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981), *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984), *Fleetwood v. Newport News Shipbuilding & Dry Dock Company*, 776 F.2d 1225, 1234, n.9 (4th Cir. 1985), and *Lafaille v. Benefits Review Board*, 884 F.2d 54 (2d Cir. 1989), which authorize or approve of *de minimis* awards in order to preserve indefinitely a LHWCA claimant's right to seek modification under Section 22, suffer from the same defects.

than three times his pre-injury earnings. *Id.* Based on that record, the ALJ found that Claimant "no longer has a wage-earning capacity loss," and terminated Claimant's disability payments. The BRB affirmed. *Id.* at 2147.

On remand from this Court, the Ninth Circuit noted in part that Claimant was employed as a crane operator and " . . . was earning more [about 300% of his pre-injury average weekly wages] than he had before his injury." *Rambo v. Director, OWCP*, 81 F.3d at 842. The Ninth Circuit nonetheless held that the Claimant was entitled to a "nominal award" for permanent partial disability because Claimant had testified in part that he did not know how long his job as a crane operator would last. *Id.*, 81 F.3d at 844. Relying in part on LHWCA Section 8(h), 33 U.S.C. § 908(h), the Ninth Circuit therefore held that the ALJ's decision to terminate the Claimant's benefits, which was affirmed by the BRB, was not supported by "substantial evidence." *Id.*, at 843-845.

However, it is well-settled that "substantial evidence" means more than a "mere scintilla." It means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427 (1971); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459 (1951). Moreover, substantial evidence is not evidence considered in isolation from that opposing it, but evidence that survives whatever in the record fairly detracts from its weight. *Universal Camera Corp. v. NLRB*, 340 U.S. at 488, 71 S. Ct. at 464.

Substantial evidence also does not include speculation, surmise or conjecture. *Cf. Consolidated Edison Company v. NLRB*, 305 U.S. 197, 230, 59 S. Ct. 206, 217 (1938) ("mere uncorroborated hearsay or rumor does not constitute substantial evidence"); *see also White v. Bath Iron Works Corp.*, 7 BRBS 86, 91-92 (1977), *aff'd*, 584 F.2d 569 (1st Cir. 1978) (ALJ's reliance on effect of the claimant's ability to earn wages in the open labor market at "some future date" was speculation). The evidence supporting the decision or order under review "must do more than merely create a suspicion of the existence of facts upon which the order is based. . . . " *NLRB v. O.A. Fuller Super Markets, Inc.*, 374 F.2d 197, 200 (5th Cir. 1967); *Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 64 (5th Cir. 1980).

In the case before the Court, the Ninth Circuit in effect issued a *de minimis* or nominal award to Claimant based on conjecture that Claimant may, at some indefinite time in the future, lose his job. However, that reasoning, that Claimant "may" lose his job at some indefinite time in the future, constitutes at best speculation and cannot as a matter of law constitute substantial evidence which

supports an award for permanent partial disability.[3] *Cf. Morrison-Knudsen Construction Company v. Director, OWCP*, 461 U.S. at 624, 103 S. Ct. at 2045 (employee's "expectation interest" in employer contributions to union

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[3] The Ninth Circuit's award of permanent partial disability benefits to an LHWCA claimant who is receiving post-injury wages well in excess of the claimant's pre-injury wages on the grounds that the claimant "may" lose his job at some time in the future is also inconsistent with this Court's mandates in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251 (1994), and *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312 (1982). In *Greenwich Collieries*, this Court emphasized in part that a LHWCA claimant has the burden of proof, and must meet that burden of proof by a "preponderance of evidence" without the assistance of the "Benefit of Doubt Rule." Thus, a claimant who is working and receiving post-injury wages well in excess of his pre-injury wages does not meet his burden of proof by a preponderance of the evidence in the record considered as a whole based simply on an unsupported claim that he may lose his job at some indefinite time in the future. As the Court has also noted, under Section 8(c)(21), 33 U.S.C. § 908(c)(21), it is necessary for the LHWCA claimant to initially prove that his injury has actually decreased his wage earning capacity. *Cf. Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, ___, 113 S. Ct. 692, 695 (1993). Moreover, in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. at 615, 102 S. Ct. at 1317, the Court emphasized in part that the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. That same reasoning applies no less to the claim of a LHWCA claimant who has returned to work and is regularly and continuously earning wages well in excess of his pre-injury wages. The allegation that such a claimant "may" lose his job at some indefinite time in the future is plainly insufficient to shift the burden of proof to the employer. Indeed, the Ninth Circuit's decision herein also imposes on the employer the "difficult job of proving a negative." *Cf. Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980).

trust funds for health, welfare, pensions and training was "at best speculative" and "unpredictable" and thus could not be included in the definition of wages); *see Bolduc v. General Dynamics Corp.*, 9 BRBS 851 (1979) (mere possibility that the claimant may lose his job is too speculative a basis upon which to award permanent partial disability).

Moreover, the Ninth Circuit's decision authorizes and promotes "protective awards" to LHWCA claimants who in reality do not have a "disability," which is the threshold requirement for an unscheduled award under the LHWCA. *See* 33 U.S.C. §§ 902(10), 908(c)(21); *cf. Potomac Electric Power Company v. Director, OWCP,* 449 U.S. 268, 269, 101 S. Ct. 509, 510 (1980). In a similar context, the BRB and the Fifth Circuit have held that " . . . nothing in the LHWCA or the governing regulations authorizes the filing of protective [LHWCA] claims or even recognizes their existence." *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants,* 17 F. 3d 130, 135 (5th Cir. 1994); *Black v. Bethlehem Steel Corp.,* 16 BRBS 138, 142 (1984).

Similarly, nothing in the LHWCA or the governing regulations authorizes the issuance of "protective awards" in order to preserve a LHWCA claimant's right to seek modification in the future. Section 8(h) only applies after there has been an initial determination that the claimant has sustained a "disability" pursuant to Sections 2(10) and 8(c)(21), 33 U.S.C. §§ 902(10), 908(c)(21). *See Owens v. Traynor,* 274 F. Supp. at 773 (" 'anatomical impairment' is not the same as 'disability' . . . [under the LHWCA]; [Section 8(c)(21)] does not permit the award for permanent partial disability

. . . unless there has been some loss of wage-earning capacity").

Furthermore, the finding of the ALJ in this case that Claimant does not have a wage-earning capacity loss is supported by substantial evidence in the record considered as a whole.[4] That evidence in the record included Claimant's retraining, his reemployment as a crane operator at substantially higher wages than his pre-injury wages and Claimant's continued employment at higher wages (more than 300% of his pre-injury wages) from at least 1985 to 1990.[5] Thus, the Ninth Circuit also erred in engaging in a *de novo* review and reweighing the evidence, and substituting its own views for that of the ALJ as the trier of fact. *See Container Stevedoring Company v. Director, OWCP,* 935 F.2d 1544, 1546 (9th Cir. 1991)

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[4] *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981), which used the same approach of the Ninth Circuit in allowing a "nominal award," is distinguishable because in *Hole* the ALJ, as the trier of fact, initially found that the claimant's post-injury earnings did not fairly and reasonably represent the claimant's wage-earning capacity, and that the claimant had a "disability." In the present case, the ALJ found otherwise.

[5] In *Edwards v. Director, OWCP,* 999 F.2d 1374 (9th Cir. 1993), *cert. denied sub nom. Todd Shipyards Corp. v. Edwards,* 114 S. Ct. 1539 (1994), the Ninth Circuit held in part that evidence that a LHWCA claimant had worked for eleven weeks following retraining was insufficient to show suitable alternate employment because eleven weeks of employment did not show that such work was realistically and regularly available. However, in the present case, five years of post-injury employment (at wages well in excess of Claimant's pre-injury wages) showed that such employment was indeed "realistically and regularly available."

(" . . . court cannot substitute its own views for the ALJ's views or engage in *de novo* review of the evidence").[6]

Because the ALJ's decision is supported by substantial evidence in the record considered as a whole and because the Ninth Circuit relied on speculation and improperly substituted its own view of the evidence for that of the ALJ, the Ninth Circuit's decision should be reversed.

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[6] Section 21(b)(3), 33 U.S.C. § 921(b)(3), mandates that the findings of fact in the decision under review of the trier of fact by the BRB shall be "conclusive" if supported by substantial evidence in the record considered as a whole. *See also* 20 C.F.R. § 802.301. That same standard, required of the BRB, also applies to a review by the court of appeals. *See* 33 U.S.C. § 921(c); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 71 S. Ct. 470 (1951); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 85 S. Ct. 1012 (1965). Further, the findings of the BRB may not be disturbed by the court of appeals unless they are unsupported by substantial evidence in the record considered as a whole; the reviewing court's function is exhausted when it appears that there is warrant in the evidence and a reasonable legal basis for the BRB's award. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1333 (9th Cir. 1978), *cert. denied*, 440 U.S. 911, 99 S. Ct. 1223 (1979), *citing to Cardillo v. Liberty Mutual Insurance Company*, 330 U.S. 469, 479, 67 S. Ct. 801, 807 (1947). In the present case, the Ninth Circuit went beyond that standard of review and drew its own inferences from the record, contrary to the findings of the ALJ.

C. The Ninth Circuit's Decision Is Inconsistent With The Supreme Court's Repeated Mandate That Sympathy Is an Insufficient Basis For Providing A Recovery Not Authorized By Congress.

The primary rationale for the Ninth Circuit's decision, to allow a "nominal" award to a LHWCA claimant who is earning higher wages post injury than his pre-injury average weekly wage, is that such an approach is the " . . . only mechanism available to incorporate the possible future effects of a disability in an award determination." *Rambo*, 81 F.3d at 844. The Ninth Circuit noted that such an approach would indefinitely extend the period for modification pursuant to Section 22, but reasoned that it was nonetheless necessary.[7] *Rambo*, 81 F.3d at 844.

While that is a "laudable concern," the paramount goal of the LHWCA is to compensate for lost earning capacity. *See Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1292 (9th Cir. 1983), *cert. denied*, 466 U.S. 937, 104 S. Ct. 1910 (1984). In *Todd Shipyards v. Black, supra*, the Ninth Circuit criticized the BRB's adoption of the Date of Last Exposure Rule for determining average weekly wage in occupational disease cases. The BRB had reasoned that

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[7] The Ninth Circuit's reasoning that such an approach is the only mechanism available to incorporate the possible future effects of a disability (beyond the Section 22 one-year statute of limitations) is plainly wrong. The only mechanism available for such an approach would be action by Congress to amend the LHWCA. *See Director, OWCP v. Rasmussen*, 440 U.S. 29, 47, 99 S. Ct. 903, 913 (1979) (the courts are not free to " . . . rewrite Congress's words").

the Date of Last Exposure Standard would guarantee compensation for workers who are retired when their injuries become manifest. Nevertheless, the Ninth Circuit emphasized that although that was a "laudable concern," the paramount goal of the LHWCA is to compensate for lost earning capacity. *Todd Shipyards v. Black*, 717 F.2d at 1292. That same criticism applies with equal force to the reasoning of the Ninth Circuit in the case before the Court.

Moreover, this Court has repeatedly emphasized that it is not to be lightly assumed that Congress intended that the LHWCA produce incongruous results. *Baltimore and Philadelphia Steamboat Company v. Norton*, 284 U.S. 408, 412-413, 52 S. Ct. 187, 188 (1932); *Potomac Electric Power Company v. Director, OWCP* ("PEPCO"), 449 U.S. 268, 283, 101 S. Ct. 509, 517 (1980). In *PEPCO, supra*, the Court emphasized that compelling language in the LHWCA could not be ignored or rewritten because it led to seemingly unjust results and further that sympathy is an insufficient basis for approving a recovery that Congress has not authorized. *PEPCO*, 449 U.S. at 283. Those same admonitions apply herein.

Section 22 is clear on its face and requires that a modification claim be filed within one year of the date of rejection of a claim or the date of the last payment of compensation. 33 U.S.C. § 922. Furthermore, in a "non-scheduled" permanent partial disability case, the LHWCA claimant is only entitled to a compensation award based on "66⅔ percent" of the difference between the claimant's average weekly wage at the time of injury and his wage earning capacity thereafter in the same employment or otherwise during the continuance of such

disability. 33 U.S.C. § 908(c)(21); *cf. Potomac Electric Power Company v. Director, OWCP*, 449 U.S. at 270-271, 101 S. Ct. at 510-511; *Owens v. Traynor*, 274 F. Supp. at 770.

The Ninth Circuit would rewrite the LHWCA statutory scheme enacted by Congress and nonetheless allow a "nominal award" to a LHWCA claimant even when there is no present economic disability. The Ninth Circuit's reasoning, that such an approach is " . . . the only mechanism available to incorporate the possible future effects of a disability in an award determination" is an attempt to rewrite the LHWCA. *Rambo*, 81 F.3d at 844. However, this Court has repeatedly admonished that the courts are not free to rewrite the LHWCA. *See e.g. Director, OWCP v. Rasmussen*, 440 U.S. at 47, 99 S. Ct. at 913 (the courts are not free to " . . . rewrite Congress's words").

On previous occasions, the courts and the BRB have attempted to rewrite the LHWCA in order to avoid harsh and incongruous results or otherwise obviate forfeiture provisions in the LHWCA which might create a trap for the unwary. *See e.g. Cross v. Potomac Electric Power Company*, 606 F.2d 1324 (D.C. Cir. 1979), *rev'd sub. nom., Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 101 S. Ct. 509 (1980); *O'Leary v. Southeast Stevedoring Company*, 7 BRBS 144 (1977), *aff'd*, 622 F.2d 595 (9th Cir. 1980); *Petroleum Helicopters, Inc. v. Barger*, 910 F.2d 276 (5th Cir. 1990), *cert. denied*, 505 U.S. 1218, 112 S. Ct. 3026 (1992).

However, in such cases, this Court has emphasized the " . . . basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written."

Estate of Cowart v. Nicklos Drilling Company, 505 U.S. 469, 476, 112 S. Ct. 2589, 2594 (1992); *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. at 283, 101 S. Ct. at 517; *Director OWCP v. Rasmussen*, 440 U.S. at 47, 99 S. Ct. at 913. "[I]t is the duty of the courts to enforce the judgment of the legislature, however much [the courts] might question its wisdom or fairness." *PEPCO*, 505 U.S. at 482, 112 S. Ct. at 2598. Indeed, "[i]f the effects of the [LHWCA] are to be alleviated, that is within the province of the legislature. It is Congress that has the authority to change the statute, not the courts." *PEPCO*, 112 S. Ct. at 2598.

In the present case, the Ninth Circuit has ignored the clear statutory language and attempted to alleviate the effects of the LHWCA Section 22 one-year statute of limitations. However, in so doing, the Ninth Circuit has ignored this Court's repeated mandate and gone well beyond its authority. The Ninth Circuit has also ignored this Court's admonition that "sympathy is an insufficient basis for providing a recovery not authorized by Congress." *PEPCO*, 449 U.S. at 283. The Ninth Circuit's decision attempts to provide a recovery not authorized by Congress and should therefore be reversed.

IV

CONCLUSION

Amicus Curiae NASSCO respectfully submits that the decision of the Ninth Circuit is founded upon an incorrect interpretation of the LHWCA. Had it been the intention of Congress to allow "nominal awards" in order to preserve a LHWCA claimant's right to seek Section 22

modification indefinitely, Congress certainly could have done so. However, Congress has not done so. Section 22 is clear on its face, and the Ninth Circuit does not have the authority to rewrite the LHWCA under the guise of construction.

Amicus Curiae NASSCO respectfully maintains that the Ninth Circuit's grant of a nominal compensation award for permanent partial disability to Claimant, simply in order to preserve the Claimant's right to seek modification under Section 22 indefinitely, is not supported by substantial evidence in the record considered as a whole and is not in accordance with law. NASSCO prays that the Court reverse the decision of the Ninth Circuit.

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Respectfully submitted,

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